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Between Modernity and Postmodernity

Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. 2d ed. London: Butterworths LexisNexis, 2002. Pp. xxiii, 565. £35 (paper).[†]

Heidi Libesman*

The project of *Toward a New Legal Common Sense* is to outline the structure of a new, more just social paradigm and to explore the possibilities for achieving it. Santos starts from the premise that the prevailing paradigm, which he calls “modernity,” is in crisis.¹ Although modernity is built upon worthy aspirations such as peace, justice, and equality, Santos believes that there is a growing gap between these aspirations and reality, a gap which the prevailing paradigm is incapable of bridging.² As a result of the crisis in modernity, we have entered a period of paradigmatic transition in which two fundamentally incompatible models—capitalism and democracy—vie for supremacy. Although Santos identifies capitalism as the hegemonic model, he argues that the struggle to determine the character of the postmodern paradigm has not yet been played out. *Toward a New Legal Common Sense* articulates and defends a counter-hegemonic model sounding in democracy.

Santos’s primary audience consists of progressive social movements, transnational non-governmental organizations (NGOs), and intellectuals who are involved with these groups, and Santos’s arguments will likely resonate most with them. However, Santos’s book is not a work of polemical advocacy, but rather an effort to rethink at a conceptual and ethical level the normative framework and cultural assumptions

[†] The first edition was published under a slightly different title: TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

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1. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* xvii (2002).

2. *Id.* at xv; *see also id.* at xvii (“[The] assumption of this book’s argument is that the dominant paradigm has long exhausted all its potentialities for emancipation.”)

underlying the historical development, epistemological ordering, economic organization, and narrative imagination of law and society. As such it should be of interest to a less self-consciously politicized audience as well.

Paradoxically, in light of its intended audience, Santos's book is written in an inaccessible style. Moreover, Santos serves up an enormous amount of empirical data and ventures with verbal gusto into a thousand subsidiary debates, which implicate centuries of human history and almost everyone under the sun writing on our age of globalization. As a result, readers may be tempted (and academic references to the book have tended) to focus on isolated elements of his argument rather than on his overall project. Accordingly, one of the aims of this review is to elucidate the conceptual structure of the book so that readers may more easily make sense of the work as a whole, determine its ambitions, and assess its contribution.

I. CONCEPTUALIZING THE CRISIS OF MODERNITY

For Santos, each historical paradigm, including the paradigm of "modernity," stands for a particular way of imagining and enacting the right relationship between "regulation" and "emancipation."³ By "regulation," Santos means the norms, institutions, and practices that stabilize the relationship between experience and expectations. "Emancipation," on the other hand, refers to the critical disruption and questioning of the relationship between experience and expectations in light of human aspirations and ideals.⁴ The relationship between regulation and emancipation is dialectical because emancipatory questioning plays a constitutive role in the formation and reformation of expectations.

What distinguishes modernity from prior paradigms is that "expectations exceed experiences." Santos writes that "[s]he who is born poor may end up dying rich. She who is born illiterate may end up dying educated or the parent of an educated child."⁵ Santos does not clearly state what he means, but I assume that the difference between modernity and other periods of human history is not the presence of people whose expectations exceed their experiences, *per se*. Rather, what is significant is the democratization of a notion that possibilities traditionally open only to certain privileged segments of humanity should in principle be open to all human beings, regardless of the fates of inheritance.

There are three basic dimensions to Santos's conceptualization of the crisis of modernity. The first dimension relates to modernity's failure, as

3. *Id.* at xv-xvi. See generally *id.* ch. 1 (entitled indicatively, "The Tension Between Regulation and Emancipation in Western Modernity and Its Demise").

4. *Id.* at 2.

5. *Id.*

an empirical matter, to realize the emancipatory promises from which it derived legitimacy and by which it inspired hope for humankind. The evidence cited here by Santos—practices of colonialism, growing inequality and poverty, genocide, warfare, exploitation and other human violations—illustrates the gap between history and modernity's promises of peace, justice, equality and liberty. Even more significantly for Santos, the evidence suggests that the divide between promise and experience is growing.⁶

The second dimension is primarily a crisis of meaning. There are two aspects to this crisis. The first is our inability to make sense of our multinational, culturally diverse, and globally interconnected societies with the categories of analysis that we inherited from the age of the modern nation-state. The history of law and society and the future of democracy can no longer be narrated exclusively in the time-space frame of the nation-state.⁷

One implication of this development is that without alternative categories and traditions of understanding, many contemporary human struggles for peace, justice, equality and liberty cannot find meaningful expression in either theory or practice. The claims of indigenous peoples and minority nations within existing nation-states often fall into this category.⁸ The risk posed by this aspect of the crisis of modernity is evinced in the contemporary experience of struggles for recognition deteriorating into civil war.⁹

Another implication is that, in "a world increasingly dominated by globalized forms of power and unequal exchanges," we need to question the modern assumption that "democracy is a national political form congruent with both the national economy and the national culture." In Santos's view, the processes of "economic and cultural globalization" have rendered this assumption obsolete. As long as congruence is not re-established at a global level, he argues, national democracy will become an increasingly "endangered species."¹⁰

At its highest level of generality, we might imagine modernity's crisis of meaning in terms of Robert Cover's metaphor of law as a bridge between extant realities and imagined alternatives.¹¹ The problem Santos identifies is that the bridge between experience and expectations, on the one hand, and utopian aspirations (such as modernity's emancipatory promises), on the other, has collapsed, leaving contemporary societies

6. *Id.* at 8-9.

7. *Id.* at 66-68, 85, 188-90. See generally chapters 3 and 5, entitled "Legal Plurality and the Time-Spaces of Law: the Local, the National and the Global," and "Globalization, Nation-States and the Legal Field," respectively.

8. *Id.* at 248.

9. *Id.* at 8.

10. *Id.* at 342.

11. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

without “paths to utopia.”¹² Indeed, one has the impression that, in Santos’s view, not only has the bridge collapsed, but the very aspirations that modern (e.g., Marxist and liberal) social and political thought have characteristically invoked have also become disconnected from the reality of human struggles for freedom in the twenty-first century.

The second aspect of the crisis of meaning concerns the role of law in society. According to Santos, law has degenerated from a tool of emancipation to a tool of regulation. By this I understand him to mean that the stabilizing role of law in creating and protecting expectations (i.e., establishing order) has displaced its critical role of questioning established expectations and experience in light of the longer-term, even infinite, aspirations of a society. Law has become separated from the quest for “a good society.”¹³

Again, the situation of indigenous peoples and sub-state national minorities provides an example.¹⁴ Santos argues that modern nation-state traditions of constitutionalism and international law fail to do justice to culturally different constitutional identities, forms of constitutionalism, and sources of constitutional interpretation. As a result, these and other marginalized groups may experience law as an order of power rather than an order of meaning.¹⁵

The third dimension of the crisis of modernity is closely related to the second. The problem is that while the established relationship between experience and expectations has become more unstable and contingent, the instability is not proving to be emancipatory. Disruptions are plentiful but they are not accompanied by hope of change for the better.¹⁶ In an idealized modern paradigm, aspirations for a better society would redefine the content and boundaries of expectations in the course of emancipatory struggles. What was revolutionary in the present would become stabilized in the future; that was the hope and the promise of modernity. The end was not endless revolution but a dynamic equilibrium constituted by a dialectic between stabilization of norms on the one hand and critical questioning of the status quo on the other.¹⁷ This double movement would serve to maintain the value of stability while guarding against the ossification of established norms and expectations, especially where those norms and expectations violated other values that arguably should take

12. The phrase “paths to utopia” is borrowed from Paul Ricoeur, *Myth As the Bearer of Possible Worlds*, in *DIALOGUES WITH CONTEMPORARY CONTINENTAL THINKERS: THE PHENOMENOLOGICAL HERITAGE* 34 (Richard Kearney ed., 1984).

13. SANTOS, *supra* note 1, at 2.

14. *Id.* at 237-257 (discussing the encounter of indigenous peoples with modern state law).

15. In making this distinction I have in mind Robert Cover’s distinction between law as an order of meaning and the social organization of law as power. See COVER, *supra* note 11. Reading Santos in light of Cover helps to illuminate the difference Santos is aiming to express in his distinction between “order” and “good order” and “society” and “good society.” See SANTOS, *supra* note 1, at 2-3.

16. SANTOS, *supra* note 1, at xix, 10.

17. *Id.* at 2-3.

priority over stability—such as the values of equality, liberty, or human dignity. In the present, however, Santos does not see emancipatory struggles leading to the stabilization of revised, more inclusive, and liberating normative expectations.¹⁸

II. CONCEPTUALIZING POSTMODERNITY

A. Postmodern Imagination and Method

Santos argues that, as a result of the crisis of modernity, we are in a period of paradigmatic transition from modernity to postmodernity. “Postmodernity” is for Santos a tentative designation for the not-yet-imagined alternative to modernity. Accordingly, it is not a fully defined concept, but merely an attempt to name the future and thus make possible discourse on it.¹⁹

Although Santos describes his theoretical approach as postmodern, he takes pains to distinguish it from conventional versions of postmodernism.²⁰ Thus, for example, Santos disassociates himself not only from critical modern theorists such as Jürgen Habermas and Roberto Unger,²¹ but also from the postmodernists Peter Fitzpatrick and Jacques Derrida.²² In relation to the former, Santos questions their assumption that the paradigm of modernity has the critical resources to address its unfulfilled promises. On the other hand, Santos considers dominant strains of postmodern theory to be misguided because they treat the promises of modernity as mere illusions and consider deconstruction an end in itself.²³ According to Santos, we should be interested not only in deconstruction but also in the reconstruction of positive alternatives.²⁴

Santos organizes his search for a postmodern alternative around a philosophical investigation of the epistemological and structural roots of the crisis of modernity.²⁵ He argues that in order to overcome this crisis and reclaim goals of emancipation, we need to undergo a paradigmatic shift in both the way we approach knowledge of others, the world, and ourselves and the way we imagine and implement democratic aspirations.²⁶

The reconstructive dimension of Santos’s search for a postmodern alternative is informed by a cross-cultural and critical genealogical study

18. *Id.* at 10.

19. *Id.* at xvi, 2, 12, 172-77.

20. *Id.* at 35.

21. *Id.* at xvii.

22. *Id.* at 14, 18-19.

23. *Id.* at 13.

24. *Id.* at xviii, 14.

25. *Id.*, at 3, 7, 9, 10, 15, 21, 25.

26. *Id.* at 233, 234, 254-311, 342.

of traditions and perspectives that have been forgotten or unjustly marginalized. In Santos's work, these traditions and perspectives are predominantly European,²⁷ although he also argues for the need to engage traditions from other civilizations.²⁸ His approach is inspired by Foucault's critical genealogical studies, by legal anthropological literature,²⁹ and by subaltern historiography.³⁰ Santos's search also involves the use of an interpretive approach called "diatopical hermeneutics,"³¹ which I discuss below.

B. Legal Pluralism and Hermeneutics

Santos makes one of his most interesting and significant contributions to the development of a postmodern paradigm for law when he advocates expanding the hermeneutic possibilities of law beyond the boundaries of the state. That is, he combines his critique of positivist (i.e., statist) theories of law with a reconstructive theory of legal pluralism.³²

The first step toward the "emancipation" of law, Santos argues, requires "the relative uncoupling of law and the state." By this he wishes to recognize that "the nation-state, far from being the exclusive or the natural time-space of law, is only one among others."³³ Santos's argument is that an exclusive focus on the state and on hegemonic liberal hermeneutics serves to marginalize a vast array of sources and normative structures anchored in non-state entities. These sources and structures give meaning to diverse ways of being; they frame human expectations, judgments, and reactions and they thereby play a role in the complex process of identification and interpretation of principles of law in the adjudication, mediation, resolution, and containment of human conflict. Santos is concerned to highlight and bring into the purview of constitutional theory the variety of these sources, long overlooked because they are not part of the state. If law is to contribute to the resolution of human conflicts in pluralistic societies, he argues, it must be interpreted in such a way that includes the interpretations of persons and communities who have been unjustly excluded or marginalized in the past.

Two aspects of Santos's theory of legal pluralism are especially worth mentioning here. First, an important part of Santos's theory of legal pluralism is an argument for a multicultural reformation of human rights.³⁴ In order to mediate the opposition between universalism and relativism

27. *Id.* at 84.

28. *Id.* at xvii, 254-57, 475.

29. *Id.* at 86.

30. *Id.* at 233, 234, 254-311.

31. *Id.* at 273-78, 474.

32. *Id.* at 85-86. For Santos's theory of legal pluralism, see generally *id.* chapters 3 and 5; and *id.* at 426-28, and 434-38.

33. *Id.* at 85.

34. *Id.* at 280-89.

that has plagued human rights discourse and global constitutionalism projects since WWII, Santos develops a new approach, which he calls diatopical hermeneutics. Grounded in a process of cross-cultural dialogue, diatopical hermeneutics treats each culture as a partial expression of our common humanity.³⁵ Viewed alongside the works of James Tully,³⁶ Abdullahi An-na'im,³⁷ and William Twining,³⁸ Santos's method makes an important contribution to the literature on global constitutionalism and legal pluralism.

Second, although Santos is a legal pluralist, his affirmation of non-state sources and traditions of interpretation is not unqualified; he is not an ethical or cultural relativist.³⁹ His commitment to pluralism and his recognition of alternative sources of meaning and normative order are ethically bound by his commitment to universal social emancipation and social responsibility. The goal of social emancipation is meant to serve as a global source of constitutionalism in Santos's theory. That is, Santos intends emancipation to provide a normative reference for differentiating between forms of pluralism that should be recognized and encouraged and non-state sources of order that contribute to human oppression and unjust social exclusion.

C. Globalization and Social Transformation

Santos does not cast the paradigmatic transition from modernity to postmodernity simply in abstract terms. Rather, he casts it as a period in which two competing models of globalization are struggling for ascendance—an unfinished story of contemporary global history in which we are implicated as potential actors.

Santos refers to the first model as “neo-liberal hegemonic globalization” or “global capitalism,” understood as “a mode of production, a system of norms and institutions, a model of consumption and lifestyles, a cultural universe, a regime of subjectivities.”⁴⁰ It is characterized by two phenomena: the globalization of culturally specific practices, often without regard for their socio-cultural relativity (“globalized localism”), and the impact of transnational practices and imperatives on local conditions (“localized globalism”).⁴¹

35. *Id.* at 273-278, 474.

36. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

37. Abdullahi An-na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 19 (Abdullahi An-na'im ed., 1992).

38. WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* (2000).

39. SANTOS, *supra* note 1, at 17, 89 (emphasizing that “rejection of cultural relativism” is one of the most important distinguishing features of his reading of the postmodern project).

40. *Id.* at xvi.

41. *Id.* at 177-182.

The other model, which Santos names “counter-hegemonic globalization,” is associated with the agendas of progressive social movements and NGOs struggling for the primacy of democracy and human rights over global capitalism. Although these movements are sometimes locally grounded, they frequently have transnational linkages. The overlapping agendas and global interconnectedness of these groups qualify as a phenomenon of “subaltern cosmopolitanism.”⁴² During the period of paradigmatic transition, Santos appears to imagine progressive social movements and NGOs as the trustees of modernity’s aspirations (peace, justice, liberty, equality, and so on). For instance, Santos sees a model of counter-hegemonic globalization in the human rights movement, which invokes the language of “human rights as an emancipatory script.”⁴³ This movement also draws on socio-economic critiques of neo-liberal capitalism and post-imperial traditions of constitutionalism to address the cultural dimensions of modernization and globalization.⁴⁴

By such emphasis on progressive social movements and transnational NGO’s, Santos makes clear that he has a practical notion for articulating and realizing his vision of counter-hegemonic globalization.⁴⁵ This practicality is what leads him to describe his project not simply in terms of a new philosophy, but also as a new legal “common sense.” If the role of socially concerned intellectuals is to theorize a new common sense, the role of social movements and transnational NGO’s is to incorporate this new paradigm of thinking in action. The competing models of globalization are not simply images of an abstract theory for Santos. They are rooted in what he identifies as an emerging sociology of extant practices of globalization. The relationship between theory and practice projected in his work is therefore not simply unidirectional (going from theory to practice), but rather dialectical. Progressive social movements and NGOs are, in Santos’s theory, at the interface of normative world-building and practical social transformation. They are, accordingly, the primary vehicles for translating Santos’s philosophy from a new theoretical paradigm into a new common sense that takes root in the subconscious groundwork of human suffering, struggle, and flourishing.

III. FIVE CRITICISMS

While conscious of many other aspects of Santos’s book that could be introduced into our discussion, I would like to offer in conclusion five critical remarks that I think have particular bearing on the reception of Santos’s work. First, anyone who ventures to read Santos’s book is in for a

42. *Id.* at 458.

43. *Id.* at 280-81; *see also id.* at 282-86, 474.

44. *Id.* at 475, 480-87.

45. *See id.* at 182-86, 280-86, 458-59 (discussing the social basis of global agency).

difficult read, not only because it is a genuinely complex and intellectually challenging work, but also because the aesthetic and analytical quality of Santos's writing is very uneven. There are some beautiful passages and the book is densely packed with observations, empirical references, and insights that make it susceptible to Talmudic-like commentary. On the other hand the density of Santos's writing also manifests itself in a profusion of ideas crammed into shorthand formulations that say too little relative to the ambitious claims and controversial theses they are meant to sustain. It is a persistent paradox that Santos's work, while passionately committed to the translation of his universally liberating philosophy into a new common sense, is written in a very inaccessible style. As a consequence, the reception of Santos's ideas may be more limited than is merited by their substance.

On a more substantive level, a second observation is that specialists in some of the areas where Santos specifies his theoretical argument may find themselves frustrated by his analysis, which tends towards empirical oversimplification and theoretical generalization.⁴⁶ Third, one of the many difficulties in making sense of Santos's book lies in his tendency to use the same term, including key terms such as "emancipation" and "modernity," in a variety of ways and at different levels of generality without clearly identifying his intended meaning in each context. For example, within Santos's abstract conception of modernity, "emancipation" seems to be a methodological concept: Santos uses the term to mean questioning established norms in light of their underlying ideals. However, Santos also uses "emancipation" as a shorthand expression for a particular substantive goal. When used in this sense, emancipation is not neutral with respect to ideals, but represents a particular ideal to which Santos wants to give priority. It is evident that there must be a relationship between the substantive ideal of emancipation and the abstract methodological concept. But Santos does not clearly distinguish between the two uses, which occasionally obscures his meaning.

My fourth remark concerns an important theme of the book. Although Santos does not always refer to liberal constitutionalism and modern constitutionalism synonymously, as one progresses through his critique it becomes fairly obvious that his challenge is to the pre-eminence of liberal political philosophy in imagining and implementing the emancipatory promises of modernity. There is some tension in Santos's work, however, between his goal of relativizing liberal political theory in light of other constitutional and cultural traditions and his tendency to reject its relevance and value as a tradition for thinking about law and social

46. An example is Santos's case study of the European Union as an example of "the globalization of the legal field." See *id.* at 200-08.

emancipation in an age of globalization. My concern is that Santos overstates the hegemony of statist philosophies of law and understates the complexity of the traditions of interpretation with which he disagrees.

For example, Santos contrasts his postmodernist vision with hegemonic liberal theory, but he does not engage the serious attempts within liberal societies and liberal traditions of enquiry to respond to the legacies of colonialism and injustice that are so central to his diagnosis of the crisis of modernity. Thus, Santos argues that “[t]he liberal paradigm has been at the root of the states’ aversion to recognizing collective rights of groups other than itself.”⁴⁷ But conspicuously absent from his analysis is any mention of contemporary liberal political theorists’ attempts to respond to this critique and develop principled arguments for group-differentiated rights and jurisdictions.⁴⁸ Nor does Santos take into account developments within constitutional law (for example, in post-1982 Canada and post-apartheid South Africa) that attempt to respond to the challenges posed by the legacies of European imperialism within a liberal framework. These arguments and developments complicate some of the assertions that predicate Santos’s conclusive dismissal of liberal political thought as irrelevant to the struggles of humanity for freedom in the twenty-first century.⁴⁹

My own view is that there is more room for reconciliation than Santos concedes between his own work and the work of critical modern theorists (such as Jürgen Habermas) and pluralist liberal political philosophers (such as Will Kymlicka and John Rawls). They are also concerned with at least three issues at the heart of Santos’s project: the growing gap between empirical realities and the emancipatory promises of modernity, the separation of law from the quest for good order, and the inadequacy of theories of constitutionalism that focus exclusively on the nation-state. Like Santos, these thinkers are also deeply involved in the search for intellectual resources within theory, tradition, and experience to support a renewed faith in the reality and universality of the emancipatory promises of modernity without falling into the logic of cultural imperialism or political apologia.

My fifth remark concerns Santos’s complex argument that capitalism and democracy are fundamentally incompatible. In particular, I think that he articulates a compelling case for the priority of principles of democracy over principles of capitalism. It is, in essence, an argument for the priority of human rights and human dignity over profit maximization. He is also right, in my opinion, to consider neo-liberal institutions and practices of capitalism more problematic once they are viewed from the perspective of

47. *Id.* at 243.

48. *See, e.g.*, WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1996).

49. *Id.* at 243.

their political and constitutional character rather than economic efficiency alone. But it is one thing to argue for the priority of the principles of democracy, and it is another thing to claim, as he does, that the future of democracy depends on the outright rejection of capitalism. Here again, I wonder whether Santos oversimplifies the choice we face and insufficiently addresses literature that denies the irreconcilability of democracy and capitalism.⁵⁰

The first three problems identified above are especially likely to attract strong criticism, and much of this criticism may well be justified. However, readers who dwell on the flaws within Santos's book risk missing what the work primarily offers: namely, a framework, a terminological reference, and a wealth of intellectual resources for thinking about the meaning of the processes of decolonization, globalization, and post-modernization in which we are historically implicated in the twenty-first century. Santos's project is based on the notion that we do better to participate thoughtfully in history, at least in the determination of its meaning and normative significance, than to respond with resignation—especially when questions of justice and humanity are at stake. For those who share this commitment, Santos's text should be of great interest. Whatever its limitations, it promises a much needed interdisciplinary meeting-ground for discussion. Whether that promise is fulfilled will depend on us, its readers.

50. See, e.g., MICHEL ALBERT, CAPITALISM VS. CAPITALISM: HOW AMERICA'S OBSESSION WITH INDIVIDUAL ACHIEVEMENT AND SHORT-TERM PROFIT HAS LED IT TO THE BRINK OF COLLAPSE (Paul Haviland, trans., 1993) (1991); IRENE LYNCH FALLON, WORKING WITHIN TWO KINDS OF CAPITALISM (2002); ANDREW FRASER, REINVENTING ARISTOCRACY: TOWARD A CONSTITUTIONAL REFORMATION OF CORPORATE GOVERNANCE (1998); Ian B. Lee, *Is There a Cure for Corporate "Psychopathy"?*, AM. BUS. L. J. (forthcoming 2005).

